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earnings from manual labor would naturally diminish because of his advancing years long before he lived out his life expectancy.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 189.]

Error to Circuit Court, Bath County.

Action by L. N. Arrington against the Chesapeake & Ohio Railway Company. Judgment for plaintiff, and the defendant brings error. Reversed and remanded.

*J. M. Perry*, of Staunton, for plaintiff in error.

*O. B. Harvey*, of Clifton Forge, for defendant in error

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RUCKDESCHALL *v.* SEIBEL et al.

Nov. 20, 1919.

[101 S. E. 425.]

**1. Usury (§ 38\*)—Agreement to Share Profits.**—If an investment was made in a particular enterprise or business, entitling the investor to a share of the profits, and the agreement as to the profits was in fact a guaranty of a minimum, but left the investor entitled to a greater profit, if made, so that in effect a partnership was created, and the agreement for profit was not in the nature of an agreement for interest, the transaction would not have been usurious.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 426.]

**2. Usury (§ 117\*)—Degree of Proof.**—Usury must be proved by a clear and satisfactory preponderance of the evidence; proof beyond a reasonable doubt being unnecessary.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 468.]

**3. Equity (§ 345\*)—Answer to Bill of Discovery as Evidence.**—Where answer under oath, responsive to cross-bill charging usury, and exhibited as a bill of discovery, made statements which, if true, disclose a transaction free of usury, the evidence of such answer must be overcome by the testimony of two witnesses, or of one witness and corroborative circumstances, and a different state of facts established, to entitle cross-complainant to relief.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 409.]

**4. Usury (§ 117\*)—Sufficiency of Evidence to Show Usury.**—Evidence held to establish by a clear and satisfactory preponderance of the evidence that true nature of transaction, whereby payee had paid over \$9,000 and had taken note for \$10,000 payable 30 days after date, was not an actual investment in any particular enterprise or business, but an agreement for a profit in the nature of interest on

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\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

the \$9,000 loaned, which exceeding the legal rate, made the original obligation usurious.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 468.]

**5. Usury (§ 111' (4)\*)—Cross-Bill of Discovery by Defendants in Suit to Enforce Lien.**—One who occupied such a relationship to the debt that he could make the defense of usury against the enforcement of it could maintain cross-bill admitting liability for principal sum justly due after elimination of the usury, and legal interest thereon, for discovery of the usury, and for relief therefrom, based on such discovery, independent of Code 1904, § 2822, affording that remedy to "borrower;" such statute having been enacted, not to give equity jurisdiction of suits for discovery and relief in cases of usury, which jurisdiction previously existed, but to enable a plaintiff to maintain bill, without waiving forfeiture of interest.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 663.]

**6. Usury (§ 111 (4)\*)—Cross-Bill of Discovery by Accommodation Indorser; "Borrower."**—Since, under Code 1904, § 2822, giving borrower remedy by way of bill of discovery and relief from usury, accommodation indorser could maintain bill in the name of the "borrower" for his use and benefit, equity, which looks at the substance and not the form of things, would not dismiss such bill merely because filed by such indorser in his own name.

[Ed. Note.—For other definitions, see Words and Phrases, Borrower. For other cases, see 4 Va.-W. Va. Enc. Dig. 633; 13 Va.-W. Va. Enc. Dig. 453.]

**7. Usury (§ 127\*)—Accommodation Indorser Entitled to Plead Usury.**—Accommodation indorser, being a surety on the obligation, is entitled to plead usury.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 456.]

**8. Usury (§ 109\*)—Applicability of Statute of Limitation.**—Code 1904, § 2823, giving person who has paid usury one year after payment in which to bring suit to recover it, does not, in view of section 2821, apply to suits in equity by borrower or a surety for relief from unpaid usury, unless the plaintiff in such a suit seeks to have credited on the debt payments which have been in fact made and applied to the usurious principal or interest.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 472.]

**9. Usury (§ 109\*)—Applicability of Statute of Limitations.**—2 Purdon's Dig. Pa. (13th Ed.), p. 1988, par. 2, requiring action to recover usury paid to be brought within six months after time of payment, has no application to suits in equity for relief from unpaid usury.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 472.]

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\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

**10. Usury (§ 100 (2)\*)—Application of Payments on Usurious Debt.**—Where maker and indorsers on usurious note made payments without applying payments to the usurious portion of the debt, the court, in suit for relief against the usury, will under Code 1904, § 2823, eliminate the usurious principal and all interest, and will apply the payments on the principal sum justly due, and will allow lender to recover only the balance thus found to be owing to him of such principal, without any interest.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 129.]

**11. Usury (§ 100 (2)\*)—Application of Payments on Usurious Debt.**—Where maker and indorsers on usurious note made payments, without applying payments to the usurious portion of the debt, the court, in suit for relief against the usury, will, under Purdon's Dig. Pa. (13th Ed.) p. 1988, par. 2, eliminate the usurious principal and all interest thereon, and apply the payments on the principal sum justly due, together with the legal interest thereon, and will allow the lender to recover the balance thus found to be owing to him of such principal and legal interest.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 129.]

**12. Appeal and Error (§ 1033 (1)\*)—Error Favorable to Appellant.**—Question of whether court erred in favor of appellant, where appellee does not complain, will not be considered.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 608.]

**13. Usury (§ 88\*)—Prima Facie Novation from New Transaction.**—Court, in passing on question of whether there has been a novation of original usurious obligation, will regard a new transaction in which third parties are mixed up with favorable eye, and in absence of explanation of the coming in of new parties to a new obligation in which the relationship of obligors is changed, as where a new party appears as maker of a new obligation or the like, there is a prima facie presumption of fact that there has been a novation of the original obligation, though the new obligation includes a part or the whole of the usury involved in prior transaction.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 466.]

**14. Usury (§ 88\*)—Test of Novation.**—Question of whether a new obligation constitutes a novation of usurious transaction is a question of fact, as to whether the new obligation is executed for motives unaffected by the usurious consideration, and is intended to supersede or supplant the original security.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 447.]

**15. Usury (§ 88\*)—Confession of Judgment by Accommodation Indorser Not Novation.**—Where renewal note, with accommodation indorsement not appearing on original note, was executed for same

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\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

consideration as original note, and where there was no new consideration moving to accommodation indorser for his confession of judgment for balance due on renewal note, confession of judgment was not a novation of the original debt, so as to purge it of usury.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 447.]

**16. Judgment (§ 619\*)—Defense of Usury Not Barred by Judgment.**—A judgment by default, or by consent, or one rendered in action in which usury was not in fact pleaded or put in issue as a defense, does not bar the judgment debtor from thereafter setting up the defense of usury against the judgment, when it is sought to be enforced in a court of equity.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 449.]

**17. Usury (§ 122\*)—From Decree on Usurious Claim.**—In action by judgment debtor to be relieved from usurious portion of judgment, decree should not have given judgment debtor option to retain and deduct the usurious principal and interest upon payment of balance of judgment, but should have fixed the amount of the judgment, subject to the deduction of the usurious principal and interest thereon.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 449.]

**18. Usury (§ 122\*)—In Judgment Debtor's Action to Purge Judgment of Usury, Personal Judgment for Judgment Creditors Unnecessary.**—In judgment debtor's action to purge judgment of usury, court, in fixing amount of judgment subject to the deduction of the usurious principal and interest thereon, need not render personal judgment for judgment creditor for amount found to be justly due; a personal judgment for judgment creditor already existing.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 449.]

Appeal from Circuit Court, Warren County.

Bill by R. C. Bane against H. J. Seibel, Jr., Bernard Ruckdeschall, and others, in which defendant Seibel filed answer against defendant Ruckdeschall, which court ordered to be treated as a cross-bill and bill of discovery. Judgment for defendant Seibel on cross-bill, and defendant Ruckdeschall appeals. Affirmed and remanded for modification.

*Blackburn Smith*, of Berryville, and *Ward & Larrick*, of Winchester, for appellant.

*E. H. Jackson* and *Aubrey G. Weaver*, both of Front Royal, for appellee.

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\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.